

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

DALE L. MARIANO

CASE NO. 96-62220

Debtor

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MICHAEL J. PATANE

Plaintiff

vs.

ADV. PRO. NO. 96-70215A

DALE A. MARIANO

Defendant

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

This proceeding is before the Court upon the complaint of Michael J. Patane ("Plaintiff"), filed on August 14, 1996. Plaintiff seeks a determination by the Court that a certain debt owed by Dale L. Mariano ("Debtor") is nondischargeable pursuant to § 523(a)(6) of the Bankruptcy

Code (11 U.S.C. §§ 101-1330) (“Code”). Plaintiff also seeks to deny the Debtor a discharge pursuant to Code § 727(a)(4). Issue was joined by the filing of an answer on behalf of the Debtor on September 19, 1996.

The trial of the adversary proceeding was originally scheduled to be held on December 2, 1996. On November 1, 1996, the Plaintiff filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (“Fed.R.Civ.P.”), incorporated by reference in Rule 7056 of the Federal Rules of Bankruptcy Procedure (“Fed.R.Bankr.P.”). The trial was stayed pending a decision by the Court. On December 13, 1996, the Court issued a decision granting Plaintiff partial summary judgment on the issue of whether Debtor’s conduct was willful under Code § 523(a)(6). *See Patane v. Mariano (In re Mariano)*, Case No. 96-62220, Adv.Pro. 96-70125. (Bankr. N.D.N.Y. Dec. 13, 1996).

The trial was held on May 1, 1997, in Utica, New York, and the Court heard testimony from both parties, as well as testimony from two other witnesses on behalf of the Plaintiff.<sup>1</sup> In lieu of closing arguments, the Court requested the parties provide it with post-trial memoranda of law. The matter was submitted for decision on May 28, 1997.

### **JURISDICTIONAL STATEMENT**

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<sup>1</sup>At the close of the Plaintiff’s proof, the Debtor moved for dismissal of the second cause of action of the complaint based on Code § 727(a)(4). The Court reserved its decision until the close of the Debtor’s proof. At that time, the Court granted the Debtor’s motion, finding that there had been no proof that the Debtor had knowingly and fraudulently made a false oath in connection with information provided in his petition concerning his assets.

The court has core jurisdiction over the parties and subject matter of this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(I).

### **FACTS**

In February 1992 Plaintiff was the owner of a landscaping business located in Canastota, New York known as Patane's Christopher Gardens. For approximately five years prior to February 1992 Plaintiff had employed the Debtor on a seasonal basis from approximately April through November of each year. On or about February 10, 1992, Plaintiff informed the Debtor that his services as foreman would no longer be required. Plaintiff testified that his reason for not rehiring the Debtor was because of Debtor's poor attitude. Plaintiff alleges that the Debtor was disruptive and uncooperative. At the Debtor's request, Plaintiff agreed to reconsider his decision.

On March 2, 1992, Plaintiff attempted to reach the Debtor by telephone. Debtor testified that he received a message from his father that Plaintiff wished to speak with him. Plaintiff testified that he had expressly asked that the Debtor telephone him. Instead, the Debtor went to Plaintiff's place of business where he found the Plaintiff at his desk on the second floor of the building. Plaintiff informed the Debtor that he would not be hiring the Debtor back for the upcoming season. It was Plaintiff's testimony that he offered to provide a letter of reference to the Debtor to assist in obtaining alternative employment elsewhere.

Plaintiff's written statement given to the police a few days after the incident ("Written Statement") describing what occurred next was as follows:

I said Dale I am asking you to leave. He then told me that he was going to kill me and called me various obscene [sic] names. I said that [sic] fine just leave. Pointing in my face he then threatened me and Pete again at which time I had had enough. I jumped up from behind my desk knocking thing [sic] off my desk and said to him you don't scare me like you do everyone else so just get out now. He continued he [sic] threats. I pointed in his face and said get out now he said come on hit me hit me. I kill [sic] you. I saw he was trying to bait me into a fight and I backed up and said I am formally asking you to leave my office now . . . .

*See Debtor's Exhibit A.*

Plaintiff testified that he asked Debtor to leave several times. However, it was the Debtor's testimony that he recalled the Plaintiff asking him to leave only once. Susan Zupan ("Zupan"), who had been employed by the Plaintiff at the time of the incident<sup>2</sup> and was present on the first floor of the building at the time of the confrontation, testified that she heard the Plaintiff ask the Debtor to leave 3-4 times. Valerie Moore ("Moore"), who operated a business on the first floor of the building at the time, testified that she recalled hearing the Plaintiff tell the Debtor to leave at least a dozen times.

Debtor testified that having been told to leave he exited Plaintiff's office and headed to the back door located in the outer office on the second floor of the building. In the process, he acknowledged that he picked up several files of papers and threw them down the stairs and about the outer office. Plaintiff testified that at that point he left his office and "encountered" the Debtor with his outstretched hands before dropping them to his side. In his Written Statement, Plaintiff indicated that he

rushed up to [Debtor] and shoved him on the chest toward the door and said get out. As I put my hands down he pulled me towards him and punched me in the

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<sup>2</sup>On cross-examination Zupan acknowledged that at the time of the trial she was indebted to the Plaintiff for a loan he made her in connection with her purchase of a business after she left Plaintiff's employ.

face at the same time. My glasses went flying and I went backward. I fell over a stool and onto the drawing board then to the floor. I could hear someone coming up the stairs . . . .

*See Debtor's Exhibit C.*

At the trial the Plaintiff testified that after the Debtor punched him he stood over the Plaintiff and started screaming "I'll get you ... Nobody screws with me." Debtor denied standing over the Plaintiff and yelling at him after he knocked Plaintiff to the ground. Moore, while initially indicating that she had not heard the Debtor say anything after the Plaintiff fell, corrected her testimony by indicating that she did not recall hearing the Debtor say anything after the Plaintiff fell. Neither Zupan nor Moore witnessed the actual "encounter" as they were both on the first floor when they heard raised voices. Moore testified that she had started up the stairs only to be cautioned by Zupan not to go up. Neither Zupan nor Moore were able to testify concerning who "touched" who first.

Debtor's version of the incident varies in some respects with that of the Plaintiff. Debtor testified that he was upset with the Plaintiff's decision and felt Plaintiff was being unfair and too hard on him. Debtor acknowledged that he had taken a folder of papers from the Plaintiff's desk and had thrown them to the floor and had also grabbed some files and thrown the papers down the stairs and about the outer office as he headed to the back door across from the Plaintiff's office. It was the Debtor's testimony that as he approached the back door the Plaintiff was yelling "Who the f... do you think you are coming into my office and throwing things around . . . ." According to the Debtor, he turned around, Plaintiff grabbed him and they struggled. Debtor testified that he told the Plaintiff repeatedly to release him and when he did not, Debtor struck him in the face. Debtor contends that he did not initiate the physical contact and had not

intended to hurt the Plaintiff.

Plaintiff sustained bodily injury as a result of being struck in the face by the Debtor. This included two black eyes and a broken nose for which Plaintiff received medical and surgical treatment. The Debtor was arrested and consented to an “Alford Plea” to a charge of assault in the third degree. Plaintiff commenced an action against the Debtor in New York State Supreme Court, Madison County. On March 2, 1995, summary judgment was granted in favor of the Plaintiff and judgment was entered against the Debtor on July 12, 1995, in the amount of \$236,000, including \$100,000 in punitive damages (“Judgment”). *See Mariano*, slip op. at 2-3.

On May 10, 1996, the Debtor filed a voluntary petition pursuant to chapter 7 of the Code. The only liability listed in the Summary of Schedules is the unsecured claim of the Plaintiff in the amount of \$286,669.90.

### **DISCUSSION**

The sole issue presently before the Court is whether the Debtor’s conduct was malicious, thereby rendering the Judgment against him nondischargeable pursuant to Code § 523(a)(6). As noted in its prior decision in connection with this proceeding, “exceptions to discharge are to be strictly construed in favor of the debtor and against the creditor.” *See id.* at 4 (citing *Grogan v. Garner*, 498 U.S. 279, 286, 111 S.Ct. 654, 659, 112 L.Ed.2d 755 (1991); *Nat’l Union Fire Insur. Co. v. Bonnanzio (In re Bonnanzio)*, 91 F.3d 296, 300 (2d Cir. 1996)). It is the Plaintiff’s burden to establish by a preponderance of the evidence that the Debtor’s conduct was malicious. “Malicious” has been defined as “wrongful and without just cause or excuse, even in the absence

of personal hatred, spite, or ill-will.” *See Navistar Financial Corp. v. Stelluti (In re Stelluti)*, 94 F.3d 84, 87 (2d Cir. 1996) (citations omitted).

Both parties attempted by their testimony to minimize the extent to which either of them was upset or angry. Yet it is evident from the testimony of both Zupan and Moore that they heard raised and angry voices coming from the second floor which caused Moore to start up the stairs to investigate and Zupan to caution Moore not to interfere. By his own Written Statement to the police, Plaintiff indicated that when he told the Debtor in his office that he was not afraid of the Debtor, Debtor had responded by taunting the Plaintiff to hit him. *See Debtor’s Exhibit A*. Just how many times after that the Debtor was told by the Plaintiff to leave is not clear. However, both parties acknowledge that the Debtor was in the outer office and heading towards the back door of the building when the “encounter” occurred. Plaintiff does not deny that the initial physical contact at that point was made by him. In his own written words, Plaintiff stated that he “shoved” the Debtor towards the door apparently in an effort to hasten his departure. Debtor also testified that as a result of the contact the Debtor went backwards. It was at that point that the Debtor grabbed the Plaintiff and hit him, causing him to fall over a stool and onto the floor.

Plaintiff relies on several New York cases to support his position that he was justified in using reasonable force to eject the Debtor from the premises without being liable for assault and battery. However, whether or not Plaintiff’s shoving of the Debtor was justified has no bearing on the issue *sub judice*. The question is whether the Debtor was justified in striking the Plaintiff.

In *Dutka v. Dilley (In re Dilley)*, 25 B.R. 179 (Bankr. W.D. Wis. 1982), the plaintiff was the uninvited guest at the debtor’s home and had been requested to leave. *See id.* at 180. The plaintiff shoved the debtor and used abusive language against the debtor immediately prior to

being hit by the debtor. The court found that the debtor was “under a reasonable belief that the plaintiff was about to strike him and that he was in imminent risk of injury.” *See id.* The court concluded that the debtor struck the plaintiff in self-defense and was “neither willful nor malicious as those terms are used in connection with 11 U.S.C § 523(a)(6).”

In *Williams v. Slee (In re Slee)*, 40 B.R. 825 (Bankr. D.Vt. 1984), the debtor contended that he hit the plaintiff in self-defense after plaintiff threatened him first with a “sucker punch.” *See id.* at 827. The plaintiff sustained a broken jaw and lost several front teeth as a result of being struck by the debtor several times with “rather severe blows.” *See id.* The debtor acknowledged that the plaintiff had made no subsequent attempts to hit the debtor after receiving debtor’s first punch. The court found that even if the debtor had been acting in self-defense, he could have repelled the plaintiff with a single blow and then retreated. *See id.* The court concluded that the debtor had used more force than was necessary “for the purpose of wantonly inflicting bodily injury.” *See id.* at 828.

The Court has reviewed the evidence presented and has assessed the credibility of the witnesses in the matter herein. The Debtor contends that he had cause to defend himself from the Plaintiff at the point at which the Plaintiff made physical contact with him, whether it was by shoving or grabbing the Debtor. In order to find that the Debtor acted in self-defense, the Court must consider the totality of the circumstances. The Debtor was clearly upset at having been informed that Plaintiff was not rehiring him for the upcoming season. The Debtor’s attempt at that time to instigate a fight with the Plaintiff in his office by yelling “Hit me! Hit me!” failed. He continued to vent his anger with the Plaintiff’s decision by yelling threats as he left the Plaintiff’s office. Whether the Plaintiff told him to leave, once, three times or a dozen times, the



relevant fact is that the Debtor had left the Plaintiff's office and was heading out of the building through the outer office when the Plaintiff approached the Debtor and shoved him towards the back door. Rather than ignore the Debtor's emotional outbreak in which he was yelling and throwing whatever he could grab as he headed towards the back door, Plaintiff responded by coming out of his office and confronting the Debtor in the outer office. According to the Debtor, upon being approached by the Plaintiff he turned with his back to the door and physical contact was made with the Plaintiff. Whether or not the Plaintiff actually grabbed the Debtor or merely shoved him, it is the view of the Court that as a result of the Plaintiff initiating physical contact with the Debtor, the Debtor reacted under the belief that he needed to defend himself from the Plaintiff. There was no evidence that having hit the Plaintiff once, that the Debtor continued to kick, strike or otherwise assault the Plaintiff after he fell. While the Plaintiff testified that the Debtor stood over him and continued to threaten him, neither Zupan or Moore were able to corroborate this testimony. Both testified that once they heard the Plaintiff fall to the floor, they hastened up the stairs and found the Plaintiff on the floor and the Debtor departing the premises. Furthermore, in the Plaintiff's Written Statement he makes no mention of the Debtor standing over him. He merely indicates that the Debtor was "still screaming threats as he went outside on the deck." *See* Debtor's Exhibit C. As suggested by the court in *Slee*, in defending himself the Debtor repelled the Plaintiff with a single blow and then retreated. Although intentional and willful, the Court concludes that Plaintiff has failed to establish by a preponderance of the evidence that the Debtor's actions were also malicious under the circumstances.

Based on the foregoing, it is hereby

ORDERED that the relief sought in the complaint to the extent that it seeks to render the

Judgment non-dischargeable pursuant to 11 U.S.C. § 523(a)(6) is denied and the complaint is dismissed.

Dated at Utica, New York

this 25th day of September 1997

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge